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Supreme Court of the United States

OCTOBER TERM, 1962

No. 349

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

FLAME COAL COMPANY, CO-DEE COAL COMPANY
AND AMANDA COAL COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD[1]

UMW believes its statements of the case and of the evidence in the certiorari petition are both accurate and plenary. To avoid giving the Court a distorted picture of the events which occurred at Flame's tipple, UMW has detailed separately, and has not commingled therewith, those activities which were detailed as occurring at mining operations of companies unrelated to Flame, Co-Dee and Amanda and with which those three companies had no business relationships. This fact is empha-

[1] The parties will be referred to herein as they were in the certiorari petition. The abbreviation "O.B." refers to Companies' opposition brief, while that of "Pet." refers to the certiorari petition herein and "(Pet. App.)" refers to the appendix to that petition. Unless otherwise indicated, all emphases herein are supplied.

sized in the certiorari petition (pp. 17-20) and the opposition brief offers no challenge thereto.

UMW believes, too, that the questions as presented in its petition raise the issues properly.

Further, because UMW believes that answers to arguments and statements advanced in Companies' opposition brief are to be found in the certiorari petition, no attempt will be made to reply, *seriatim*, thereto. However, the following discussions have relevancy to the Reasons for Granting the Writ, at the same time challenging Companies' statements, arguments and positions.

UMW's Reply to Companies' Argument 1

Answers to Companies' contentions on Argument 1 (O.B. 8-16) are found in UMW's certiorari petition (pp. 20-26).

Companies incorrectly state (Br. 8) that Question 1's jurisdictional question was disposed of in the *Meadow Creek* and *Osborne* cases[2] since neither concerned a common-law claim in a state which, like Kentucky, would not permit a labor union to be used as such. Even in *Gilchrist*[3], as the certiorari petition notes (Pet. 21, fn. 18), activities occurred both in Tennessee wherein a union may be sued and in Kentucky, in which it may not be sued, *Gilchrist* did not discuss the issue. Companies do not dispute this.

Though Companies inaccurately urge upon this Court that voluntary unincorporated associations are consid-

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[2] *UMWA* v. *Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52; *UMWA* v. *Osborne Mining Co.*, 6 Cir., 279 F. 2d 716.

[3] *Gilchrist* v. *UMWA*, 6 Cir., 290 F. 2d 36. While Companies note this Court denied certiorari in *Meadow Creek* (359 U.S. 1013), *Osborne* (364 U.S. 881) and *Gilchrist* (368 U.S. 875), such refusals import "no expression of opinion on the merits." *Polites* v. *U. S.*, 364 U. S. 426, 433, fn. 9.

ered legal entities in Kentucky, their failure to reply to UMW's citation (Pet. 21) of *Sweeney* v. *City of Louisville*, 309 Ky. 465, 218 S.W. 2d 30, which rejected an action brought against an association as such, is telling.[4]

Nor did either *Meadow Creek*, *Osborne* or *Gilchrist* deal with the question of federal preemption. In the case at bar, Companies' complaint avowed the district court had jurisdiction by virtue of Taft-Hartley's Section 303—nothing else! Since Companies press the district court's jurisdiction of the common-law claim under *Hurn* v. *Oursler*, 289 U. S. 238, a concomitance of consideration must be this Court's reasoning that both claims "so precisely rest upon *identical facts* as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U.S. 246). Companies do not, for they cannot, explain why *Hurn's* thesis does not require implementation of this Court's rule of federal preemption. Instead they aver, and UMW says erroneously, that this question was disposed of in the *Laburnum* and *Russell* cases.[5] Significantly, in its certiorari petition

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[4] Companies' reliance upon *Int. Union of Operating Engineers* v. *Bryan*, 255 S.W. 2d 471, 474 (Ky.), *UMWA* v. *Comer*, 159 Ky. 605, 167 S.W. 891, and *Hotel etc. Employees Local Union No. 181* v. *Miller*, 272 Ky. 466, 114 S.W. 2d 501, cited by Companies (O.B. 9, 10) are not supportive of Companies' contention.

In *Operating Engineers*, the court decided only that a non-resident union could be required to produce documents by service of a subpoena duces tecum directed to a resident officer and union representative under the class action statutes (255 S.W. 2d 474).

In *Comer*, there was no objection to the suit by special demurrer or special pleas in abatement for which reason the court permitted judgment to stand.

In *Hotel Employees*, the question of suability was not before the court, which found the union made an appearance to the suit by motion to modify an injunction order.

[5] *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U.S. 656; *International Union, U.A.A. etc.* v. *Russell*, 356 U.S. 634.

(pp. 23-4), UMW's reasons for *Laburnum's* inapplicability are delineated, and Companies do not answer UMW's contention that, unlike *Laburnum*, which involved the Act's Section 8(b) (1)(A), wherein this Court rejected the preemption doctrine because the Act "sets up no general compensatory procedure", Section 303 specifically so provides. Like *Laburnum*, *Russell* was a state court action; neither involved the issue of diversity of citizenship which is lacking here. Like *Laburnum*, *Russell* held federal preemption inappropriate because the federal act involved did not provide a remedy for recovery of damages for the activities proscribed. Section 303 does so provide, and the Supreme Court so noted in *Laburnum*, declaring (347 U.S. 665):

> "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims *for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages. . . .*"

Though Companies cite (O.B. 12-14) various cases to support their view that the district court had jurisdiction over the nonfederal claim under the pendent jurisdiction doctrine, not a single case so cited involved the core issues of the question posed in UMW's Question 1, namely, whether the pendent jurisdiction doctrine permits a nonfederal claim when Kentucky itself would not permit a suit based thereon against the union in its common name and whether the doctrine of federal preemption precluded the applicability of the pendent jurisdiction doctrine (see UMW's Question 1, Pet. 3). These crucial factors are avoided and ignored in Companies' statement of their Question 1 (O.B. 1-2). The Sixth Circuit committed itself

in *French Renovating Co. v. Ray Renovating Co.*, 6 Cir., 170 F. 2d 945 (1948), in interpreting *Hurn v. Oursler*, to the rule that a *sine qua non* to district court jurisdiction required that "both federal and nonfederal causes rest upon substantially identical facts"; and logically therefore by enacting Section 303 Congress would have precluded state action based on such facts. Accord: *Allen v. Barr*, 6 Cir., 196 F. 2d 159. The absence of common facts has been used by other courts to reject the joinder of a nonfederal claim. *Strey v. Devin's Inc.*, 7 Cir., 217 F. 2d 187; *Landstrom v. Thorpe*, 8 Cir., 189 F. 2d 46; *Crabb v. Welden Bros.*, 8 Cir., 164 F. 2d 797; *Eisenmann v. Gould-National Batteries, Inc.*, DC, E.D. Pa., 1958, 169 F. Supp. 862.

Companies' citations (O.B. 12) of patent or trademark cases must be regarded in light of the fact that Congress codified *Hurn* in enacting 28 USC Section 1338, which expressly grants jurisdiction of a "claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws": See Reviser's Note, 28 USCA 1338, p. 108. Reference to the pendent jurisdiction doctrine in Section 1338 and *its absence in the other jurisdictional sections* of the Judicial Code demonstrate clearly that applicability of *Hurn* was restricted to cases arising under that one section.*

Similarly, anti-trust cases cited by Companies (O.B. 13) must be appraised in light of this Court's statements in *Apex Hosiery Mills v. Leader*, 310 U.S. 469, 483-4,

* See "The Proposed Revision of the Federal Judicial Code", 60 Harvard Law Review 424, 431, where it is said: "In restricting the scope of the provision concerning joinder of nonfederal cases question to patents, copyright, and trademark cases, the proponents of the bill *have failed* to take advantage of an opportunity to resolve the large question of such joinder as applied to all types of cases involving original jurisdiction."

that in a "suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws" and in *Hunt v. Crumboch*, 325 U.S. 821, 826, "Whether the respondents' conduct amounts to an actionable wrong subjecting them to liability for damages *under Pennsylvania law is not our concern.*"

UMW's Reply to Companies' Argument 2

UMW counsel are fully aware that certiorari is usually rejected to review a lower court decision turning solely upon an analysis of particular facts. Certiorari is available however where reexamination acquires importance for reasons such as are presented under Reason II in the certiorari petition (pp. 26-34). Only recently did this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, — U.S. —, 8 L. ed. 2d 777, reexamine and evaluate evidence in the light of previous decisions of this Court presenting important questions under federal statutes. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320. That is the present situation where the Sixth Circuit has sustained a secondary boycott charge but to do so, has utilized criteria in conflict with those heretofore enunciated by this Court as necessary to a Section 303 violation, as set forth in the certiorari petition (pp. 26-34).

In citing *Troupe v. Transit Co.*, 2 Cir., 234 F. 2d 253, Companies have overlooked the Second Circuit's statement (p. 258), "We need not here decide whether there is jurisdiction . . . under the *Hurn v. Oursler* doctrine, of a pendent claim of unseaworthiness when combined in one action with a substantial and related claim under the Jones Act, since it *affirmatively appears . . . the district court* had jurisdiction . . . over the unseaworthiness claim *because of diversity of citizenship.*"

Likewise, their citation of *Jordine v. Walling*, 3 Cir., 185 F. 2d 662, 671, fails to note that the Third Circuit declared: "It follows that *in the absence of diversity of citizenship the district court did not have jurisdiction* to entertain the plaintiff's count for maintenance and cure in a civil action tried to a jury."

Petitioners do not, as Companies charge, request a determination on the basis of conflicting evidence; and the question presented in Question 2 is posed as one seeking a review "as a matter of law" (Pet. 3).

It is paradoxical that Companies now emphasize in their brief (p. 19) the element of the *objectives* of the strike and picketing activities, for, as pointed out later herein (post, p. 12), that is an element about which the jury was never instructed although district court jurisdiction was premised upon an alleged Section 303 violation. Further, the Sixth Circuit's opinion does not deal with this vital factor, except to say UMW's "general objective was to require Flame to sign the union's contract" (Pet. App. iv). So it was; but UMW's object was also to have Amenda, Co-Dee and truckers to sign. The Sixth Circuit's interference with the right of primary activity went further, for, to compound its error, it declared a secondary boycott existed because of activities at other mining operations although a union contract was sought at each of such operations which had no business relationship with either of Companies.

Companies undertake to distinguish the case at bar from that of *Local 761*[8] on the basis that the Sixth Circuit herein found there had been violence. After *Local 761* was decided by the Supreme Court, the National Labor Relations Board rejected the same argument now made by Companies.[9] In *Local No. 5895, United Steelworkers of America (Carrier Corporation)*, 132 NLRB 127 (July 13, 1961), cited to but ignored by the Sixth Circuit, the Board declared (132 NLRB 130, fn. 2): "Finally, we take

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[8] *Local 761, International Union of Electrical, etc. Workers v. NLRB*, 366 U.S. 667.

[9] This case is cited in the certiorari petition (p. 29). Pertinently, Companies' brief makes no response to UMW's discussion.

issue . . . that the threatening of railroad personnel and the blocking of train passage at the picket line requires the finding of a Section 8(b)(4)(B) violation here. *Such conduct . . . does not convert primary activity into conduct proscribed by the secondary provisions*", citing and quoting from *International Rice Milling Co., Inc. v. NLRB*, 341 U.S. 665, 672.

The Sixth Circuit (Pet. App. iv), as the certiorari petition directs the Court's attention (Pet. 27), employed the *"separate entity" theory to hold that as to Flame*, both Amanda and Co-Dee were "neutrals", although admittedly UMW sought to have each sign a contract, there was a dispute with each of them, and each therefore was a primary employer. The Sixth Circuit itself admitted all three "are controlled by one person", Virginia Collins (Pet. App. i). UMW submits that as to Flame, neither Amanda nor Co-Dee meets the "neutral" person test reflected by the Act's legislative history discussed in the certiorari petition (pp. 27-28). So, too, as the petition shows (p. 28) a union contract was sought from each truck owner who was a primary employer in the dispute. Furthermore, as the petition (p. 28) shows, they were not "wholly unconcerned" in the dispute between Companies and those seeking to have Virginia Collins recognized UMW as the bargaining representative.

UMW's certiorari petition (p. 27) notes the Sixth Circuit's test has been rejected by the District of Columbia Circuit and the Fifth Circuit, as well as by the Kentucky Court of Appeals; and Companies do not challenge this assertion. Only recently, in *NLRB v. Gibraltar Industries, Inc.*, 4 Cir., — F. 2d —, 51 LRRM 2029 (August 23, 1962), the Fourth Circuit registered its disapproval of the separate entity theory and emphasized the element of control.

Moreover, Companies discussion of *Local 761* demonstrates its misconception of this Court's holding therein. Companies overlook that therein this Court made clear that Section 8(b)(4)(A), Section 303's counterpart, "could not be literally construed", because to do so "would ban most strikes historically considered to be lawful, so-called primary activity" (366 U.S. 672) and that "'Congress did not seek by §8(b)(4), to interfere with the ordinary strike'" (p. 672). Companies ignore, too, this Court's enunciation that where there is an entrance and there is a mingled use thereof, "such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees" and such use is "outside the bar of §8(b)(4)(A)" [366 U.S. 682]. It is a notable fact that Companies ignore too this Court's holding that "The key to the problem is found in the type of work that is being performed by those who use the" gate (366 U.S. 680). Upon remand of *Local 761* to the National Labor Relations Board, that agency held that picketing in *Local 761* "was lawful primary picketing" because the work of the secondary employers was related to the normal operations of the primary employer. See *Local 761, International Union, etc.* (General Electric Company), decided August 28, 1962, 138 NLRB No. 38, 51 LRRM 1028, 1030. In the Board's Local No. 5895, United Steelworkers case (*ante*, p. 7), because "delivery of empty boxcars to Carrier and the transportation of Carrier products—clearly were related to Carrier's normal operations" the Board held there was no secondary boycott activity, thus implementing Local 761's principle that the "key to the problem" is to be found in the type of work being done by those passing through the gate. This was indeed true in the case at bar where coal mined

at Co-Dee and Amanda operations was trucked by truckers to Flame's tipple.

Companies' efforts (O.B. 19-20) to dissipate the importance of the numerous pending cases involving the same questions posed herein merely invites this Court to permit the Sixth Circuit, in interpreting an important federal statute, to continue to ignore, as it did in the case at bar, this Court's criteria enunciated in *Local 761* and other cases discussed in the certiorari petition (pp. 26-34) as essential to a Section 303 violation and thus to set a pattern not only as to the instant and the pending cases but one which may be applied whenever a secondary boycott case arises, thereby clearly frustrating Congress' intent and purpose expressed in the Act's Section 13 that except as Congress—not the Sixth Circuit—diminished the right to strike, nothing should be construed to diminish that right in any way. The Sixth Circuit's attention was directed to *Local 761*, but its opinion ignored it. If the Sixth Circuit deemed it inapposite, it failed to explain its reasons. The Sixth Circuit's pattern of silence may be expected to continue in all secondary boycott litigation unless this Court, upon review by certiorari, corrects the Sixth Circuit's error.

Companies' argument (O.B. 24) that Congress effected no change by making railroad employees subject to the Act must be rejected as attributing to Congress the doing of an useless act and, further, it is opposed by Senate Report No. 187 on S. 1555 (Pet. 33) that "railroad employees . . . are not employees within the meaning of the act".

Companies argument (O.B. 24-25) that Congress' change of the Act's language has rendered moot UMW's position that train crew incidents do not fall within Sec-

tion 303's scope is answered readily by this Court's *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 8 L. ed. 2d 305, 312, wherein it declared that upon holding erroneous one theory of liability upon which a general verdict may have rested, the Supreme Court will reverse a judgment based on such verdict even without exploring the legality of other theories. Moreover, in addition to correcting error in the instant case, correction of the Sixth Circuit's error herein will preclude similar error in the numerous pending cases.

UMW's Reply to Companies' Argument 3

UMW's answer to Companies' insistence that its award of punitive damages is warranted is found in the certiorari petition (pp. 34-39).

UMW *did not*, as Companies charge (O.B. 25), contend the Sixth Circuit did not respond to UMW's argument questioning the allowance of punitive damages. UMW's petition (pp. 34-39) complained the Sixth Circuit approved the jury's award of $50,000.00 punitive damages. Pointing out that the Sixth Circuit did not expressly delineate whether punitive damages were premised upon activity violative of Section 303 or the common-law claim, UMW's complaint was the Sixth Circuit failed to respond to UMW's propositions, *first*, that Section 303 "would not permit punitive damage awards", and, *second*, if based upon the common-law claim, no award could be made thereunder because of the federal preemption doctrine (Pet. 34-39).

As to the first position, Companies offer no answer. They do not deny the efficacy of *UMWA v. Patton*, 4 Cir., 211 F. 2d 742, which specifically rejected the contention that punitive damages are recoverable under Section 303. Companies do not offer answer to UMW's demonstration

that Section 303's legislative history shows positively Congressional intent that punitive damages are not to be awarded under the statute.

To circumvent the importance of this federal legislation, although that is the statute under which the district court's jurisdiction was based, Companies seek to sustain the punitive damage award *by assuming* the award was made under Kentucky's common law. But neither the jury's award nor the Sixth Circuit's opinion warrants that assumption. However, even so assuming, Companies' brief affords no answer to UMW's position that the doctrine of federal preemption rejects the award under Kentucky's common-law rule.

It is no answer to UMW's contention that Congress, in providing for compensatory damages *alone* under Section 303 and denying punitive damages thereunder, foreclosed an award of punitive damages under a common-law claim, for Companies (O.B. 25-26) to rely upon *Laburnum* and *Russell* to support the punitive damage award. As already noted, *(ante,* pp. 3-4) those two cases concerned activities violative of the Act's Section 8(b)(1)(A) and *not Section 303;* they were both state court actions; and what the Supreme Court found lacking in the Act's Section 8(b)(1)(A), namely, *procedures to compensate for tortious conduct banned thereby,* Congress provided in Section 303 for its proscribed activity and the Supreme Court took judicial cognizance thereof in *Laburnum,* as already shown *(ante,* pp. 3-4).

UMW's Reply to Companies' Argument 4

In UMW's Reason IV for granting the writ (Pet. 39-43), UMW complained that although Companies asserted district court jurisdiction under the Act's Section 303, at no time was the jury ever advised of the elements con-

stituting a violation of that statute and particularly the element of the *object* of the strike and picketing. UMW's proffered but rejected charge would have supplied the elements and corrected so vital an error. The error thus made was compounded by the district court's erroneously defining a secondary boycott (Pet. 11-12).[10]

The district court's charge, quoted in Companies' opposition brief (pp. 31-32), demonstrates fully and clearly the lack of any concern as to the *object* of the activities of which Companies complained, despite Companies' argument in another portion of its brief of that element's importance (O.B. 18-19). Companies' profession that the charge sufficed is to be tested by their failure to denote specific language which covers this vital factor, even in substance.

If Section 303's elements are immaterial, then upon what basis did Companies assert federal jurisdiction? If such elements were asserted solely to warrant federal jurisdiction, and then abandoned, then such asserted jurisdiction is frivolous and condemned under *Bell* v. *Hood*, 327 U.S. 678, in which event the issue of diversity of citizenship as a basis for federal jurisdiction becomes crucial and, in this case, lacking (see Pet. 21 et seq.).

This Court in Local 761 verbalized on the difficulty federal courts and the labor board have experienced in interpreting Section 303. It was voiced also by Circuit Judge Prettyman in *Retail Clerk's Union Local 770 v. NLRB*, D.C. Cir., 296 F. 2d 368, 374, when, referring to Section 8(b)(4)(A), he said, *"This case brings into*

[10] Companies' statement (O.B. 29) that the Sixth Circuit did not consider the trial court's refusal to give Instruction IV "of such merit" to require discussion is incorrect. What the appellate court stated was, "We discuss such of them [questions involved] as we consider require it" (Pet. App. iii).

focus the difficulties and complexities of administering this section of the statute." This demonstrates the positive necessity that a jury charge be given with utmost clarity, precision and completeness. Because Companies added a common-law violation to the complexities attending Section 303, it was vital that the trial court apprise the jury with the distinctions involved so that jurors would have been properly guided.

Companies' effort to circumvent the problem posed in UMW's Reason IV (Question 4), whereby the issue of UMW's liability was never properly submitted, by charging UMW's failure to object properly to the district court's jury charge must be rejected under Sixth Circuit principles heretofore enunciated which Companies totally ignore. *First*, as pointed out in the certiorari petition (p. 42) the Sixth Circuit's *Bellak* v. *United Home Life Ins. Co.*, 6 Cir., 244 F. 2d 623, mandates that a trial court's duty is to charge the jury correctly on material issues; and, *secondly*, while UMW's objection (R. 484a) charged district court error "with reference to the secondary boycott provision . . . in that the Court did not define the boycott in terms of the Statute", at the same time UMW noted "the Court erred in refusing to give Instruction Numbers 4 and 5 [R. 466-7a] with reference to the boycott as tendered by the defendant", and in *Hasselbrink* v. *Speelman*, 6 Cir., 246 F. 2d 34, the Sixth Circuit held that refusal to grant an instruction requested sufficed to bring a claimed error to the court's attention, even though the instruction was not objected to at the proper time. Accord: *City of Knoxville v. Bailey*, 6 Cir., 222 F. 2d 520, 529; *Westchester Fire Inc. Co. v. Hanley*, 6 Cir., 284 F. 2d 409, 418. See also this Court's *Sunkist* case (8 L. ed. 305, 311). Moore's Federal Practice—Rules and Official Forms, As Amended 1961, pp. 682-3 states: "Hence although no timely or prop-

er objection was made, the court's error in instructing on a material issue may be the basis for grant of a new trial by the district court *when it is apparent that a miscarriage of justice may otherwise occur.*"

As the certiorari petition notes (p. 42), where, as here, it is not possible to tell whether the jury believed UMW had violated Section 303 or Kentucky's common law, *and there is error in the court's charge, Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 8 L. ed. 2d 305 (May 28, 1962) holds the verdict cannot be upheld. The existence of pending cases in both the Sixth and Fourth Circuits, as the certiorari petition points out (pp. 42-3) emphasizes the importance of a review of UMW's Question 4.

CONCLUSION

For the reasons discussed herein and in the certiorari petition, the writ prayed for therein should issue.

Respectfully submitted,

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